IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KEITHEN RAY HAROLD JR.,
Appellant.

No. 2 CA-CR 2012-0316
Filed February 14, 2014

Appeal from the Superior Court in Pima County
No. CR20112427001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Keithen Harold Jr. was convicted of one count of sexual assault. The trial court sentenced him to an enhanced, presumptive prison term of 10.5 years. On appeal, Harold argues that his speedy trial rights were violated. He further contends the court erred by failing to preclude the testimony of an expert witness, denying his request for a *Willits* instruction,[1] refusing to allow him to impeach a witness with a prior conviction, and denying his motion for a mistrial based on improper closing arguments by the prosecutor. For the reasons stated below, we vacate the criminal restitution order but otherwise affirm Harold's conviction and sentence.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the verdict. *State v. Boozer*, 221 Ariz. 601, ¶ 2, 212 P.3d 939, 939 (App. 2009). In December 2001, then sixteen-year-old L.C. saw two men in a parked car "trying to get [her] attention" as she walked to work from her apartment. L.C. approached the car and asked for a cigarette. The passenger, Harold, who introduced himself as "KiKi," pulled out a brown vial that he said contained "water" and asked if she would like some on her cigarette. Suspecting that "water" was a drug, L.C. asked about its effects. Harold told her it was "like marijuana" and the effects would last between twenty and thirty minutes. L.C. agreed and got in the back seat of the car. After smoking the cigarette, L.C. felt "disorientated [sic]" and "woozy."

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[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

¶3 As the other man drove the vehicle, Harold climbed into the back seat. The driver eventually stopped the car on a dead-end street and both men took turns sexually assaulting L.C. Afterwards, L.C. was driven back to her apartment. On the way, Harold asked L.C. for her telephone number.

¶4 When she arrived at her apartment, L.C. told her older sister, L.G., what had happened, and her sister called 9-1-1. After officers arrived, a man who identified himself as "KiKi" telephoned L.C. Officers recorded the name and telephone number listed on the telephone's caller identification display. That evening, a nurse collected biological samples from L.C., including DNA[2] evidence of the sexual assault and a urine sample.

¶5 Later that same month, the Tucson Police Department Crime Laboratory analyzed the samples taken from L.C. and confirmed the presence of semen on the vaginal swabs. In April 2002, a DNA analysis of the samples showed "a single source unknown male DNA profile." The detective assigned to the case interviewed potential suspects, but by December 2002 the case remained unsolved and the investigation was closed "pending a DNA hit."[3] In March 2010, a Tucson Police detective obtained a DNA sample from Harold that revealed a profile that matched the profiles developed from the swabs taken from the victim.

¶6 Harold was indicted for sexual assault on July 11, 2011. The state introduced expert testimony linking Harold to the DNA evidence recovered after the sexual assault and showing that the urine sample from L.C. may have contained traces of phencyclidine (PCP). The jury found Harold guilty, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

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[2]Deoxyribonucleic acid.

[3]The Tucson Police Department Crime Laboratory received "some preliminary information that . . . there might be a DNA match to . . . Harold" in 2005, but the laboratory did not have a DNA sample from Harold for reference at that time to confirm the match.

Speedy Trial

¶7 On appeal, Harold first argues the trial court violated his right to a speedy trial pursuant to Rule 8, Ariz. R. Crim. P., and the United States and Arizona Constitutions by granting the state's motion for a continuance so that the DNA and toxicology analyses of the samples collected in 2001 could be completed. "The decision on a motion for continuance is committed to the discretion of the trial court, and we will not disturb that decision on appeal absent a showing of a clear abuse and resulting prejudice." *State v. Cook*, 172 Ariz. 122, 125, 834 P.2d 1267, 1270 (App. 1992). We review all constitutional questions de novo. *State v. Nichols*, 219 Ariz. 170, ¶ 9, 195 P.3d 207, 211 (App. 2008); *see also State v. Parker*, 231 Ariz. 391, ¶ 8, 296 P.3d 54, 61 (2013).

¶8 Harold was arraigned on July 28, 2011. Therefore, under Rule 8.2(a)(1) his trial was required to be held within 150 days, or by December 25. At a pre-trial conference on October 14, the trial court set a November 15 trial date. Ten days after the pre-trial conference, the state filed a motion to continue the trial, informing the court that "outstanding laboratory work . . . need[ed] to be completed by both the Tucson Police Department [(TPD)] Crime Lab and the Department of Public Safety [(DPS)] Crime Lab, and the results of these analyses [we]re necessary for the State's case-in-chief." The motion was supported by affidavits from both laboratories. The affidavit from TPD stated that the analyst who had conducted the original DNA testing "no longer work[ed] for [TPD] and as a result, additional time of 90 days [wa]s required to complete all scientific retesting of evidence." The DPS affidavit stated that the urine sample had been submitted to that laboratory for toxicology analysis on October 12, 2011, and it needed until January 31, 2012, to complete its toxicology testing. Over Harold's objection, the trial court granted the motion and reset the trial for March 20, 2012.[4]

[4]On March 1, 2012, Harold filed a motion to continue the trial because of new and "potentially exculpatory" evidence disclosed by the state. The trial court granted the motion, rescheduling the trial

Rule 8 Time Limits

¶9 Rule 8.2(a)(1) provides that an in-custody defendant, like Harold, must be brought to trial within 150 days of his arraignment. A delay is permitted, however, if a party demonstrates "extraordinary circumstances exist and that delay is indispensable to the interests of justice."[5] Ariz. R. Crim. P. 8.5(b). If a trial court grants a continuance because of extraordinary circumstances, it must state the specific reasons for its decision on the record, *State v. VanWinkle*, 230 Ariz. 387, ¶ 8, 285 P.3d 308, 311 (2012), and should delay the case no longer than "necessary to serve the interests of justice," Ariz. R. Crim. P. 8.5(b).

¶10 Harold argues that the trial court "did not make the mandatory findings of 'specific reasons' that were extraordinary circumstances." Harold did not raise this argument below. Therefore, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Furthermore, because he does not argue on appeal that the error is fundamental, and, because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal if not argued); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it.").[6]

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for June 5, 2012. Harold appropriately does not raise this second continuance as an issue on appeal. Rule 8.4(a) expressly excludes "[d]elays occasioned by or on behalf of the defendant" from "the computation of the time limits" under the rule.

[5]Delays also are permitted under Rules 8.1 and 8.4. *See Snyder v. Donato*, 211 Ariz. 117, ¶ 14, 118 P.3d 632, 635 (App. 2005). All three exceptions are somewhat "overlap[ping]" and "cumulative," and a single delay may be justified under a combination of the rules. *Id.* ¶¶ 14, 17.

[6]Harold is correct that Rule 8.5(b) requires the trial court to "state the specific reasons for [granting a] continuance on the

¶11 Harold next contends the trial court erred by finding extraordinary circumstances existed to continue his trial under Rule 8.5(b). He claims the state "essentially conceded that [it] was inexplicably tardy in conducting the lab work necessary for its prosecution." Harold points out that the state had a "DNA hit" linking him to the crime in 2005 and another in 2010, "[y]et the State did not submit its request to the DPS crime lab to conduct toxicology analysis until October 12, 2011, almost 3 months after seeking [his] indictment."

¶12 First, Harold did not argue below and does not argue on appeal that his prosecution should be dismissed due to pre-indictment delay. And, the speedy trial rights afforded under Rule 8 do not begin to run until a defendant has been arraigned. Ariz. R. Crim. P. Rule 8.2(a)(1). "Our courts have consistently held that speedy trial rights do not attach under either our constitution or under the procedural rules enacted to implement the constitutional provisions until a prosecution is commenced or a defendant is held to answer." *State v. Lemming*, 188 Ariz. 459, 461, 937 P.2d 381, 383 (App. 1997). The Rules of Criminal Procedure explicitly acknowledge and provide the parties have a continuing duty to make additional disclosure "whenever new or different information subject to disclosure is discovered," Ariz. R. Crim. P. 15.6(a), after

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record." *See VanWinkle*, 230 Ariz. 387, ¶¶ 8, 10, 285 P.3d at 311-12 (trial court obligated to state reasons on the record). But, "[b]ecause a trial court and opposing counsel should be afforded the opportunity to correct any asserted defects before error may be raised on appeal, absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal." *Trantor v. Fredrikson*, 179 Ariz. 299, 300, 878 P.2d 657, 658 (1994). "[F]undamental error . . . only appl[ies] when the error goes to the foundation of the case or deprives a party of a fair trial. Although findings . . . are certainly helpful on appellate review, they do not go to the foundation of the case or deprive a party of a fair hearing." *Id.* at 300-01, 878 P.2d at 658-59.

the initial disclosure period, *see* Ariz. R. Crim. P. 15.1(a)-(c).[7] Therefore, even though the rules assume that "in most cases scientific evidence will be ready within normal time limits," *Snyder v. Donato*, 211 Ariz. 117, ¶ 22, 118 P.3d 632, 637 (App. 2005) (internal quotation omitted), they do not require testing of all evidence to be completed and compiled before a defendant is indicted, as Harold seems to suggest.

¶13 Relying on *State v. Heise*, 117 Ariz. 524, 573 P.2d 924 (App. 1977), Harold nevertheless argues, "the fact that the State waited until the eve of . . . trial . . . to submit for laboratory testing a urine sample it had possessed for 10 years is not an 'extraordinary circumstance' for Rule 8.5(b) purposes." In *Heise*, the parties stipulated to extend the time for trial for thirty days. 117 Ariz. at 524, 573 P.2d at 924. The trial court issued a minute entry setting a trial date, then, on the court's own motion moved the trial to a date ten days later. *Id.* On the day of trial, the state moved for a continuance, asserting the medical examiner was unavailable because he was on vacation. *Id.* at 524-25, 573 P.2d at 924-25. Over the defendant's objection, the trial court granted the continuance and denied defendant's subsequent motion to dismiss based on Rule 8. *Id.* at 525, 573 P.2d at 925.

¶14 On review, this court reversed the defendant's conviction and remanded the case to the trial court with instructions to dismiss with or without prejudice. *Id.* at 526, 573 P.2d at 926. We concluded that although the medical examiner's testimony was indispensible to the interests of justice, the "underlying basis" for requesting the continuance did not constitute "extraordinary circumstances." *Id.* We noted that the medical examiner had

[7]Rule 15.6(a) and (b) requires a party to notify the court and other party "seasonably" if new evidence arises after their initial disclosures and also if a disclosure may occur within thirty days of the trial. Rule 15.6(c) and (d) generally prohibit the use of evidence disclosed within seven days before trial. Here, the state complied with this requirement, and its requests to TPD and DPS for testing of the evidence also were submitted before the final deadlines contemplated under Rule 15.6.

notified the prosecutor of his vacation schedule, which did not interfere with the date originally set for trial. *Id.* at 525, 573 P.2d at 925. The problem was created when the trial court rescheduled the trial on its own motion, and, despite being aware of the medical examiner's unavailability, the state failed to notify the court of the conflict. *Id.* at 526, 573 P.2d at 926.

¶15 *Heise* is distinguishable. Here, contrary to Harold's argument, the state did not wait until the eve of trial to request a continuance. Notably, the November 15 trial date was based in large part on the trial court's and defense counsel's schedules—neither was available for trial in late November or December. But, under the Rule 8 time limits, the trial could have been scheduled for late December. And, unlike the circumstances in *Heise*, there is no indication that when the original trial date was scheduled the prosecutor was aware that the time for completing the toxicology analysis would interfere with trial. Last, the delay was attributable to the nature of the toxicology testing process, over which the prosecutor had no control. The DPS affidavit stated that the toxicology testing would require approximately three and a half months, based on "the results of a preliminary screen." The trial court did not err by finding extraordinary circumstances warranting a continuance. *See Cook*, 172 Ariz. at 125, 834 P.2d at 1270.

Constitutional Right to Speedy Trial

¶16 Harold also maintains the trial court violated his right to a speedy trial under the United States and Arizona Constitutions.[8] To determine if a delay has violated a defendant's constitutional right to a speedy trial, the court considers four factors: "(1) Whether the delay before trial was uncommonly long; (2) whether the government or the defendant was more to blame for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the

[8]The federal and state constitutions essentially afford defendants the same right to a speedy trial. *Compare* U.S. Const. amend. VI, *with* Ariz. Const. art. II, § 24; *see also Doggett v. United States*, 505 U.S. 647, 651 (1992); *State v. Spreitz*, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997).

delay." *Snow v. Superior Court*, 183 Ariz. 320, 325, 903 P.2d 628, 633 (App. 1995); *see also Doggett v. United States*, 505 U.S. 647, 651 (1992); *State v. Lukezic*, 143 Ariz. 60, 69, 691 P.2d 1088, 1097 (1984). The right to a speedy trial only applies to the "interval between accusation and trial." *Doggett*, 505 U.S. at 651; *see Yucupicio v. Superior Court*, 108 Ariz. 372, 373, 498 P.2d 460, 461 (1972). And, "[i]n weighing these factors, the length of the delay is the least important, while the prejudice to defendant is the most significant." *State v. Spreitz*, 190 Ariz. 129, 139-40, 945 P.2d 1260, 1270-71 (1997).

¶17 Harold asserted his right to a speedy trial less than two months after he was indicted on July 21, 2011. His trial began June 5, 2012. Between the indictment and trial, the state's request for a continuance accounts for four months of delay from the original trial date. And, as discussed above, the reasons for requesting this delay were not wholly attributable to either the state or Harold. *See Parker*, 231 Ariz. 391, ¶ 14, 296 P.3d at 61-62 (state not responsible for "[d]elays caused by systemic breakdowns" when circumstances out of state's control). Accordingly, the first three factors weigh in favor of the state.

¶18 As to the fourth factor, Harold argues that, "but for the delay, the State would not have had at least some of its DNA evidence and would have had none of the DPS lab evidence." But, "[w]e assess prejudice in light of the interests that the speedy trial right protects against: (1) 'oppressive pretrial incarceration,' (2) 'anxiety and concern of the accused,' and (3) 'the possibility that the defense will be impaired' by diminishing memories and loss of exculpatory evidence." *Parker*, 231 Ariz. 391, ¶ 16, 296 P.3d at 62, *quoting Barker v. Wingo*, 407 U.S. 514, 532 (1972). And, "[t]he prejudice that a defendant must show to establish an abuse of that discretion must go to his inability to present a defense, not to the state's ability to make its case." *State v. Kasten*, 170 Ariz. 224, 227, 823 P.2d 91, 94 (App. 1991). Because Harold has not shown prejudice, he has not established a violation of his constitutional right to a speedy trial. *See Spreitz*, 190 Ariz. at 139-40, 945 P.2d at 1270-71.

Expert Witness Testimony

¶19 Harold argues the trial court erred by "refusing to preclude [a DPS criminalist] from testifying about testing [L.C.]'s urine for PCP, which by [his] own testimony could not reliably apply the principles and methods to the facts of the case as required by Ariz. R. Evid. 702(d)."[9] Generally, we review the admissibility of expert testimony for an abuse of discretion. *State v. Wright*, 214 Ariz. 540, ¶ 5, 155 P.3d 1064, 1066 (App. 2007).

¶20 Rule 702, Ariz. R. Evid., governs the admissibility of expert opinion.[10] *State v. Salazar-Mercado*, 232 Ariz. 256, ¶ 5, 304 P.3d 543, 546 (App. 2013). Rule 702 states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
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> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

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[9]Harold did not cite Rule 702 in his motion to preclude the expert's testimony below. But, as the state acknowledges, Harold's arguments are clearly framed in the context of Rule 702, and, therefore, he sufficiently argued the issue below to preserve it on appeal. *See State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008).

[10]"The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled." Ariz. R. Evid. 702 cmt. to 2012 amend. The new rule "reflect[s] the principles set forth in" *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *State v. Delgado*, 232 Ariz. 182, ¶ 11, 303 P.3d 76, 80 (App. 2013). "Therefore, we consider federal court decisions interpreting the federal rule as persuasive authority." *Id.*

> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

¶21 In applying Rule 702, "[t]he Arizona Supreme Court has made clear that 'trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue.'" *Ariz. State Hosp./Ariz. Cmty. Prot. & Treatment Ctr. v. Klein*, 231 Ariz. 467, ¶ 29, 296 P.3d 1003, 1009 (App. 2013), *quoting* Ariz. R. Evid. 702 cmt. to 2012 amend. The proponent must show by a preponderance of the evidence that the expert's opinion satisfies these requirements. *State v. Bernstein*, No. 1 CA-SA 13-0285, ¶ 10, 2014 WL 118106 (Ariz. Ct. App. Jan. 14, 2014).

¶22 Before trial, the state disclosed its intent to present expert testimony from DPS criminalist, Gregory Ohlson, to explain how his subsequent toxicology analysis showed stronger indications of PCP, whereas the initial analysis of L.C.'s urine sample had produced no indication. Harold moved to preclude the testimony, arguing that Ohlson could not "say to a reasonable degree of probability whether or not [L.C.] was under the influence of PCP." He further argued that such inconclusive testimony "does not assist the trier of fact in determining a fact issue."

¶23 In denying the motion, the trial court found that precluding Ohlson's testimony could "mislead[] . . . the jury." It concluded that although Ohlson's "results don't prove the presence of PCP to a reasonable degree of medical probability . . . it's part of the results of the test . . . [and] is appropriately admitted for the jury's consideration."

¶24 On appeal, relying on Rule 702(d), Harold argues "Ohlson was unable to reliably apply the principles and methods of

gas chromatography to the specific facts of this case." Harold further contends that "Ohlson acknowledged that he could not show to a professionally accepted level of scientific certainty that [L.C.]'s urine contained PCP.

¶25 This court dealt with a similar argument in *Bernstein*. There, the defendants, all accused of driving while under the influence of an intoxicant, challenged the admissibility of the test results of the gas chromatograph used to analyze the alcohol content of their blood samples. *Bernstein*, 2014 WL 118106, ¶¶ 1-3. The trial court ruled the results were inadmissible, finding that "the State had failed to show that 'the expert has reliably applied the principles and methods to the facts of the case' as required by [Rule] 702(d)." *Id.* ¶ 4. The state challenged the court's ruling by special action in this court. *Id.* ¶ 5. In vacating the ruling, we stated:

> [T]he inquiry is whether those specific . . . test results are the product of reliable application of principles and methods. Given this narrow inquiry, it is particularly significant that the Superior Court found no evidence that any of [the] . . . test results were inaccurate or incorrect. . . .
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> . . . .
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> . . . [I]t is sufficient to note that the inquiry into reliability focuses on whether the evidence is "derived by the scientific method. Proposed testimony must be supported by appropriate validation—i.e., 'good grounds,' based on what is known."

Id. ¶¶ 21, 27, 29, *quoting Daubert*, 509 U.S. at 595.

¶26 We concluded that, applying these principles, the state had demonstrated by a preponderance of the evidence that the test results were "scientifically valid" and that the trial court had found no evidence to suggest the results were inaccurate or the tests were

done improperly. *Id.* ¶ 27. We noted, however, that the trial court had properly determined that "several of [the] Defendants' objections [went] to the weight of the evidence, not admissibility." *Id.* n.7. And, we pointed out that "each Defendant w[ould] be able to cross-examine and present evidence about [the] claimed deficiencies in the specific . . . test results at issue." *Id.* ¶ 28.

¶27 Like the defendants in *Bernstein*, Harold's arguments essentially go to the weight of the expert's opinion and not its admissibility. Although Ohlson could not definitively state that PCP was present in the urine sample based on his laboratory's standards, he stated that he could "refer to [the test results] as a presumptive positive." He also stated that "[w]e have indications that the drug is present." The jury was then free to determine whether that result helped explain L.C.'s testimony that she felt impaired after trying the cigarette with "water."

¶28 Moreover, the record does not support Harold's argument that Ohlson unreliably applied his field's methods and principles to the particular facts. Ohlson testified that initial testing gave weak indications of PCP. But, he shared multiple explanations for why the testing would provide such results. When he learned the sample was ten years old, he recognized that he "need[ed] to consider other possibilities" and that an initial "low value might indicate something that additional testing would resolve." He decided to conduct further analysis, which he stated "was the normal practice" in his field.

¶29 Under these circumstances, we cannot say Ohlson failed to apply "the principles and methods to the facts of the case." Ariz. R. Evid. 702(d). Thus, the trial court did not abuse its discretion in denying Harold's request to preclude Ohlson's testimony. *See Wright*, 214 Ariz. 540, ¶ 5, 155 P.3d at 1066.

Willits Instruction

¶30 Harold argues that the state's "failure to preserve the results of its investigation" into the telephone number and caller identification name recorded on the night of the assault necessitated

a *Willits* instruction. We review a trial court's refusal to give a *Willits* instruction for an abuse of discretion. *State v. Speer*, 221 Ariz. 449, ¶ 39, 212 P.3d 787, 795 (2009).

¶31 A *Willits* instruction "permits the jury to draw a negative inference against the state[']s case] when '(1) the state failed to preserve material and reasonably accessible evidence that had a tendency to exonerate the accused, and (2) there was resulting prejudice.'" *State v. Glissendorf*, 233 Ariz. 222, ¶ 17, 311 P.3d 244, 251 (App. 2013), *quoting State v. Broughton*, 156 Ariz. 394, 399, 752 P.2d 483, 488 (1988).

¶32 On the night of the assault in 2001, a caller identifying himself as "KiKi" telephoned L.C.'s apartment. The telephone numbers and a name from the caller identification display were included in a police report and the information was given to a TPD analyst to determine "who they belonged to and where they came from." But, by 2012, TPD had no record of the results of that investigation.

¶33 On appeal, Harold maintains that evidence from the investigation had been "reasonably accessible" and that the possible exculpatory value was "readily apparent." But, Harold has not demonstrated the state actually "lost, destroyed or failed to preserve material evidence." *State v. Youngblood*, 173 Ariz. 502, 506, 844 P.2d 1152, 1156 (1993). An officer testified that he was certain the analyst would have relayed back any information she discovered in her investigation. But he did not remember "what paperwork came back, if any." Moreover, Harold had been provided a police report that included the telephone numbers and name taken from the caller identification display. He could have conducted his own investigation. The state had no duty to gather potentially exculpatory evidence for Harold's defense. *See State v. Rivera*, 152 Ariz. 507, 511, 733 P.2d 1090, 1094 (1987).

¶34 Because Harold has not established prejudice, the trial court did not abuse its discretion in refusing to give a *Willits* instruction. *See Glissendorf*, 233 Ariz. 222, ¶ 23, 311 P.3d at 252-53 (prejudice found where defendant lost "primary tool by which he

could effectively cross-examine . . . the state's only witness to the incident"); *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (no prejudice where defendant "benefitted" from destruction of evidence).

Impeachment with Prior Conviction

¶35 Harold next argues that the trial court erred in "refusing to permit [him] to impeach [L.C.] with her prior misdemeanor conviction for giving false information to a police officer." We review a trial court's ruling on the admissibility of prior convictions for impeachment purposes for an abuse of discretion. *State v. Green*, 200 Ariz. 496, ¶ 7, 29 P.3d 271, 273 (2001); *State v. Williams*, 144 Ariz. 433, 439, 698 P.2d 678, 684 (1985).

¶36 During a pre-trial interview, L.C. admitted falsely using the name and date of birth of her sister, L.G., when speaking to law enforcement officers in California between 2005 and 2010. On the first day of trial, Harold asked the court to allow him to cross-examine L.C. about these incidents to attack her character for truthfulness. The state objected, and the court ruled that Harold could cross-examine L.C. "regarding specific instances of conduct that bear on her credibility or her character for truthfulness" but precluded evidence of "arrests or charges."

¶37 The next day, Harold filed a motion for reconsideration, arguing that he had obtained evidence that L.C. had been convicted of providing false information to a peace officer in California and that, under Rule 609(a)(2), Ariz. R. Evid., evidence of the conviction "must be admitted." The state again objected, arguing that the report of the conviction was untimely disclosed, that the document was an uncertified copy, that the conviction bore the name L.G., not L.C., and that it added no additional probative value because L.C. was going to testify that she had "used a false name and date of birth in the past." The court precluded the evidence, finding the request untimely and concluding that, "given the . . . prior rulings about the admissibility of the number of the victim's felony convictions and on the specific instances of misconduct[,] excluding this evidence will not prejudice the defendant."

¶38 On appeal, Harold argues the trial court had no discretion under the current version of Rule 609(a)(2) and was required to admit evidence of a conviction involving dishonesty or false statement. And, because the court considered prejudice to Harold in determining the admissibility of the conviction, he asserts that the court "used an incorrect legal standard and thereby abused its discretion." He further contends the court erred by finding his request untimely because the rules of disclosure do not impose upon defendants a duty to disclose impeachment evidence of a state's witness.

¶39 Rule 609(a) provides that a witness's character for truthfulness may be impeached "by evidence of a criminal conviction." Subsection (2) provides that evidence of a criminal conviction for any crime "must be admitted if the court can readily determine that establishing the elements of the crime required proving—or the witness's admitting—a dishonest act or false statement." Ariz. R. Evid. 609(a)(2). Our supreme court has said that the phrase "dishonesty or false statement" should be construed narrowly to include only those crimes involving an element of deceit or falsification. *State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (1981).

¶40 Pursuant to the current version of Rule 609(a)(2), a trial court has no discretion to preclude a witness's conviction involving a dishonest act or false statement. *See* Ariz. R. Evid. 609 cmt. to 2012 amend.; *see also United States v. Glenn*, 667 F.2d 1269, 1272 (9th Cir. 1982) ("Convictions involving 'dishonesty or false statement' within the meaning of rule 609(a)(2) are automatically admissible; the court need not conduct a balancing test."). The trial court thus erred in considering the prejudicial impact of precluding the evidence in determining its admissibility. Nevertheless, "[w]e are obliged to affirm the trial court's ruling if the result was legally correct for any reason." *Perez*, 141 Ariz. at 464, 687 P.2d at 1219.

¶41 The state argues Harold failed to offer any evidence that L.C. had been convicted in California. It maintains the "'charge summary' for someone named L[.]G[.]" that Harold proffered did not meet Rule 609(a)'s requirement for impeachment "by evidence

of a criminal conviction."[11] *Cf. State v. Lee*, 114 Ariz. 101, 105, 559 P.2d 657, 661 (1976) ("The proper procedure to establish the prior conviction is for the state to offer in evidence a certified copy of the conviction . . . and establish the defendant as the person to whom the document refers."). Although L.C. admitted using false names in the past, including the name L.G., L.C.'s own name is not mentioned in the documents that Harold provided. Presumably, L.C. would have been convicted under her own name and not another. Because Harold failed to demonstrate that L.C. actually had been convicted, the trial court did not abuse its discretion by precluding this evidence.[12] *See Green*, 200 Ariz. 496, ¶ 7, 29 P.3d at 273; *Williams*, 144 Ariz. at 439, 698 P.2d at 684.

¶42 Even assuming there was error in precluding the conviction, it was harmless. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607. During both direct and cross-examination, L.C. admitted she had been convicted of six felonies stemming from two separate cases. L.C. also testified that she had given false names and birth dates to police while living in California. Further impeachment of L.C. with a conviction for providing false information to a peace officer would have been cumulative. And, preclusion of cumulative testimony constitutes harmless error. *See State v. Dunlap*, 187 Ariz. 441, 456-57, 930 P.2d 518, 533-34 (App. 1996); *see also State v. Nordstrom*, 200 Ariz. 229, ¶ 39, 25 P.3d 717, 732 (2001) ("[A]ny error was harmless given the thoroughness with which [the witness] was impeached."), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239, 274 P.3d 509 (2012).

Motion for a Mistrial

¶43 Harold lastly argues the trial court erred "in refusing to declare a mistrial when the prosecutor implicitly argued to the jury

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[11]As proof of the conviction, Harold attached to his motion for reconsideration an uncertified "charge summary," which included two minute entry orders and a complaint.

[12]Because we affirm the trial court on these grounds, we need not address Harold's argument that the trial court erred in finding his disclosure untimely.

that [L.C.] had lost her virginity as a result of the sexual assault." "'Because the trial court is in the best position to determine the effect of a prosecutor's comments on a jury, we will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion.'" *State v. Lynch*, 225 Ariz. 27, ¶ 54, 234 P.3d 595, 606 (2010), *quoting State v. Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d 833, 846 (2006).

¶44 To determine if a prosecutor's comments constitute misconduct warranting a mistrial, a trial court should consider two factors: "(1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *State v. Medina*, 232 Ariz. 391, ¶ 78, 306 P.3d 48, 66 (2013). "To warrant reversal, the prosecutorial misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Newell*, 212 Ariz. 389, ¶ 61, 132 P.3d at 846, *quoting State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997). Attorneys have "considerable latitude" in their closing arguments. *State v. Sustaita*, 119 Ariz. 583, 593, 583 P.2d 239, 249 (1978).

¶45 During closing argument, the prosecutor said:

> If you all take a minute and just think about the first time, the first sexual experience you all have had, if you think back on that, maybe it was a long time ago, maybe it wasn't. You think about [it] and you try to remember as much detail as you possibly can about it. Think back, try to remember, where were you, who were you with, what were they wearing, how did it start, what happened. And then have somebody ask you questions in great detail and say, tell me all about it. Tell me as much detail . . . as you possibly can. And then, when you get back in the jury room,

> tell that to your fellow jurors. Tell it to a total stranger.
>
> That's what [L.C.] had to do. She had to wait . . . 11 and 1/2 years later [to] tell complete strangers, guess what, when I was 16 years old, I voluntarily, I said I wanted drugs. Yes, I said I will get in the back seat of the car with a couple of people I don't really know. And you know what they did, they sexually assaulted me.

¶46 After the prosecutor finished, Harold asked to make a motion at the trial court's convenience. Then, when the jury had left the courtroom, Harold moved for a mistrial, arguing "[t]here is no evidence that this was the first sexual experience of the victim and to suggest to the jury that it was is clearly inflammatory." In response, the prosecutor explained that his "only reason for making that statement" was to point out to the jury "what [L.C.] had to go through." The court denied the motion, concluding that "the suggestion was [not] being made that it was the victim's first sexual experience" and that the prosecutor intended "to help a juror understand how a victim might not be able to remember all of the details of that sexual experience."

¶47 Harold raises the same arguments on appeal. He also maintains that "[t]his Court should reject the trial court's finding that the prosecutor was not referring to the victim's first sexual experience because that was the only conceivable reason the prosecutor would have made his argument."

¶48 Contrary to Harold's suggestion, we defer to the trial court's characterization of the argument as it had the opportunity to view the argument firsthand. *See State v. Hansen*, 156 Ariz. 291, 297, 751 P.2d 951, 957 (1988) ("The trial court is in a better position to judge whether the prosecutor is unduly sarcastic, his tone of voice, facial expressions, and their effect on the jury, if any."). And, we cannot say the trial court erred by interpreting the prosecutor's statements as an explanation of why, given the passage of time, L.C.

did not remember all of the details of the assault and not to suggest that this was her first sexual experience. Immediately before making these statements, the prosecutor explained that L.C. had made a difficult decision in deciding, a decade after the incident, to recall the details of her sexual assault in front of nine strangers. And, immediately after, he restated how difficult it must be for a victim to recall the explicit details of a sexual assault. The trial court did not abuse its discretion by denying Harold's motion for a mistrial on the basis of prosecutorial misconduct. *See Lynch*, 225 Ariz. 27, ¶ 54, 234 P.3d at 606.

Criminal Restitution Order

¶49 Although Harold has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order [(CRO)], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."). "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This is so even when, as here, the trial court delayed the accrual of interest. Nothing in A.R.S. § 13-805,[13] which governs the imposition of CROs, "permits a court to delay or alter the accrual of interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13-805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

[13]Section 13-805 has been amended four times since the date of the offense. *See* 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4; 2005 Ariz. Sess. Laws, ch. 260, § 6. The changes are not material here.

Conclusion

¶50 For the foregoing reasons, we vacate the CRO but otherwise affirm Harold's conviction and sentence.